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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/762,992	01/22/2004	Mark Zieff	30394-101	5992

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EXAMINER

NGUYEN, TRINH T

ART UNIT PAPER NUMBER

3644

DATE MAILED: 09/19/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

**Office Action Summary**

Application No.

10/762,992

Applicant(s)

ZIEFF ET AL

Examiner

Trinh T. Nguyen

Art Unit

3644

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on RCE 6/30/05.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1-16 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-16 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- |  |   |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892)   | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)                                   | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152)             |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)<br>Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____  |

## **DETAILED ACTION**

### ***Continued Examination under 37 CFR 1.114 After Final Rejection***

1. A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on 6/30/05 has been entered.

### ***Drawings***

2. The drawings are objected to under 37 CFR 1.83(a). The drawings must show every feature of the invention specified in the claims. Therefore, the gap formed between the guard units must be shown or the feature(s) canceled from the claim(s). No new matter should be entered.

Corrected drawing sheets in compliance with 37 CFR 1.121(d) are required in reply to the Office action to avoid abandonment of the application. Any amended replacement drawing sheet should include all of the figures appearing on the immediate prior version of the sheet, even if only one figure is being amended. The figure or figure number of an amended drawing should not be labeled as "amended." If a drawing figure is to be canceled, the appropriate figure must be removed from the replacement sheet, and where necessary, the remaining figures must be renumbered and appropriate changes made to the brief description of the several views of the drawings for consistency. Additional replacement sheets may be necessary to show the renumbering

of the remaining figures. Each drawing sheet submitted after the filing date of an application must be labeled in the top margin as either "Replacement Sheet" or "New Sheet" pursuant to 37 CFR 1.121(d). If the changes are not accepted by the examiner, the applicant will be notified and informed of any required corrective action in the next Office action. The objection to the drawings will not be held in abeyance.

***Claim Rejections - 35 USC § 112***

3. Claim 13 is rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement. The claim(s) contains subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention. In this case, the limitation "said gap being equivalent in size to one or more of said guard units" has no support in the specification.

4. The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

5. Claim 13 is rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

In claim 13: it is not understood what is being claimed since there is no support in the specification for the phrase "said gap being equivalent in size to one or more of said guard units".

***Claim Rejections - 35 USC § 102***

6. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

7. Claims 1, 3-5, and 7-10, 12, 14, and 15 are rejected under 35 U.S.C. 102(b) as being anticipated by Walter et al. (US 5,682,835).

For claim 1, Walter et al. disclose a squirrel proof bird feeder, comprising:

(a) a base (52);

(b) one or more feeding chambers (50a, 50b, 50c), wherein a bottom end of said one or more feeding chambers being affixed to said base;

(c) a top locking device (see Figure 5 attached at the end of this Office Action), wherein a top end of said one of more feeding chambers opposite to said base being securely disposed within said top locking device, said top lock device includes a open top to access said top end of said one or more feeding chambers; and

(d) a removable guard (60,66; note that guard (60,66) is removable from the feeding chambers, therefore, it is a removable guard) that is capable of being disposed along a surface of said top locking device, wherein said removable guard has one or more guard units, wherein each guard unit being adapted to cover at least a portion of said open top of said top locking device, and wherein said removable guard extends horizontally outward beyond a feeding chamber to form an overhang. Furthermore, the

[a) statements of intended use or field of use, b) "adapted to" or "adapted for" clauses,

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c) "wherein" clauses, or d) "whereby"] clauses are essentially method limitations or statements of intended or desired use, do not serve to patentably distinguish the claimed structure over that of the reference. See In re Pearson, 181 USPQ 641; In re Yanush, 177 USPQ 705; In re Finsterwalder, 168 USPQ 530; In re Casey, 152 USPQ 235; In re Otto, 136 USPQ 458; Ex parte Masham, 2 USPQ 2nd 1647; and MPEP 2114 & 2115. MPEP 2114 which states: A claim containing a "recitation with respect to the manner in which a claimed apparatus is intended to be employed does not differentiate the claimed apparatus from a prior art apparatus" if the prior art apparatus teaches all the structural limitations of the claims. Ex parte Masham, 2 USPQ2d 1647.

For claim 3, Walter et al. disclose said one or more feeding chambers comprise three feeding chambers (50a, 50b, 50c).

For claim 4, Walter et al. disclose said one or more feeding chambers further comprise one or more portals (see Figure 5 attached at the end of this Office Action).

For claim 5, Walter et al. disclose said portals have disposed thereon a perch.

For claim 7, Walter et al. disclose a dome (66), wherein said dome covers the top of said feeding chambers.

For claim 8, Walter et al. disclose said dome is independent of said guard.

For claim 9, Walter et al. disclose said dome is part of said guard (note that once the dome is connected to the guard then the dome is part of the guard).

For claim 10, Walter et al. disclose said guard is removably disposed on said feeder.

For claim 12, Walter et al. disclose one or more guard are connected to said top locking device.

For claim 14, Walter et al. disclose a bird feeder comprising;  
one or more feeding chambers, wherein each feeding chamber of said one or more feeding chambers includes a top access opening; and  
at least one guard (66) disposed over said top access opening, said at least one guard being adapted to cover a portion of said top access opening,  
whereby the squirrel is prevented from accessing feed in a portion of said one or more feeding chambers below said covered portion of said top access opening while allowing the squirrel to access feed in a portion of said one or more feeding chambers not below said covered portion of said top access opening.

For claim 15, Walter et al. disclose a bird feeder comprising:  
one or more feeding chambers, wherein each feeding chamber of said one or more feeding chambers includes an top opening; and  
a modular guard (66) being disposed substantially above said top opening and being adapted to cover at least a portion of said top opening,  
whereby the squirrel is prevented from accessing feed in said feeder substantially below said covered portion of said top opening while allowing the squirrel to access feed in another portion of said feeder not below said covered portion of said top opening.

***Claim Rejections - 35 USC § 103***

8. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

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(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

9. Claims 2, 11, 13 (as best understood), and 16 are rejected under 35 U.S.C.

103(a) as being unpatentable over Walter et al. (US 5,682,835).

As described above, Walter et al. disclose most of the claimed invention except for indicating that the one or more guard units comprise three individual units.

However, it would have been obvious to one having ordinary skill in the art at the time the invention was made to have modified the feeder of Walter et al. so as to include a guard unit comprises three individual units, since it has been held that constructing a formerly integral structure in various elements involves only routine skill in the art. Furthermore, note that in lines 1-2 of page 4 of the specification, applicant stated that "The guard of the current invention is formed by one or more guard units..."; therefore, it is noted that the guard can be formed by one piece or multiple pieces since applicant has stated that the guard can be formed either way (i.e. by one piece or multiple pieces). Further note that if the guard unit comprises three individual units then there will be gaps formed therebetween the individual units.

10. Claim 6 is rejected under 35 U.S.C. 103(a) as being unpatentable over Walter et al. (US 5,682,835) in view of Applicant's Admitted Prior Art (as set forth in lines 10-11 of page 4 of the specification; hereinafter is referred to as AAPA).

As described above, Walter et al. disclose most of the claimed invention except for indicating that the chambers are securely affixed to the base via a snap-fit mechanism.



AAPA teaches that it is old and well known to use a snap-fit mechanism as a means for removably joining two structural members together. Therefore, it would have been obvious to one having ordinary skill in the art at the time the invention was made to have modified the feeder of Walter et al. so as to include the use of a snap-fit mechanism, in light of AAPA's teaching, in order to provide a more flexible means of joining/attaching (i.e. snap-fit mechanism) wherein it allows the two joining members to be removably joined together.

### ***Response to Arguments***

11. Applicant's arguments filed 6/30/05 have been fully considered but they are not persuasive.

12. Applicant argues that the feeder of Walter performs different functions. Applicant is referred to paragraph #7 above for further explanation regarding functional language in the claim.

13. Applicant further argues that Walter does not teach a removable guard, the Examiner disagrees. It is noted that a fair reading of the claim language permits the Examiner to interpret that Walter's member (60,66) is a removable guard since member (60,66) is removable from the feeding chambers.

### ***Conclusion***

14. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Trinh T. Nguyen whose telephone number is (571) 272-6906. The examiner can normally be reached on M-F (9:30 A.M to 6:00 P.M).

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If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Teri Luu can be reached on (571) 272-7045. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).



Trinh T Nguyen  
Primary Examiner  
Art Unit 3644

9/14/05

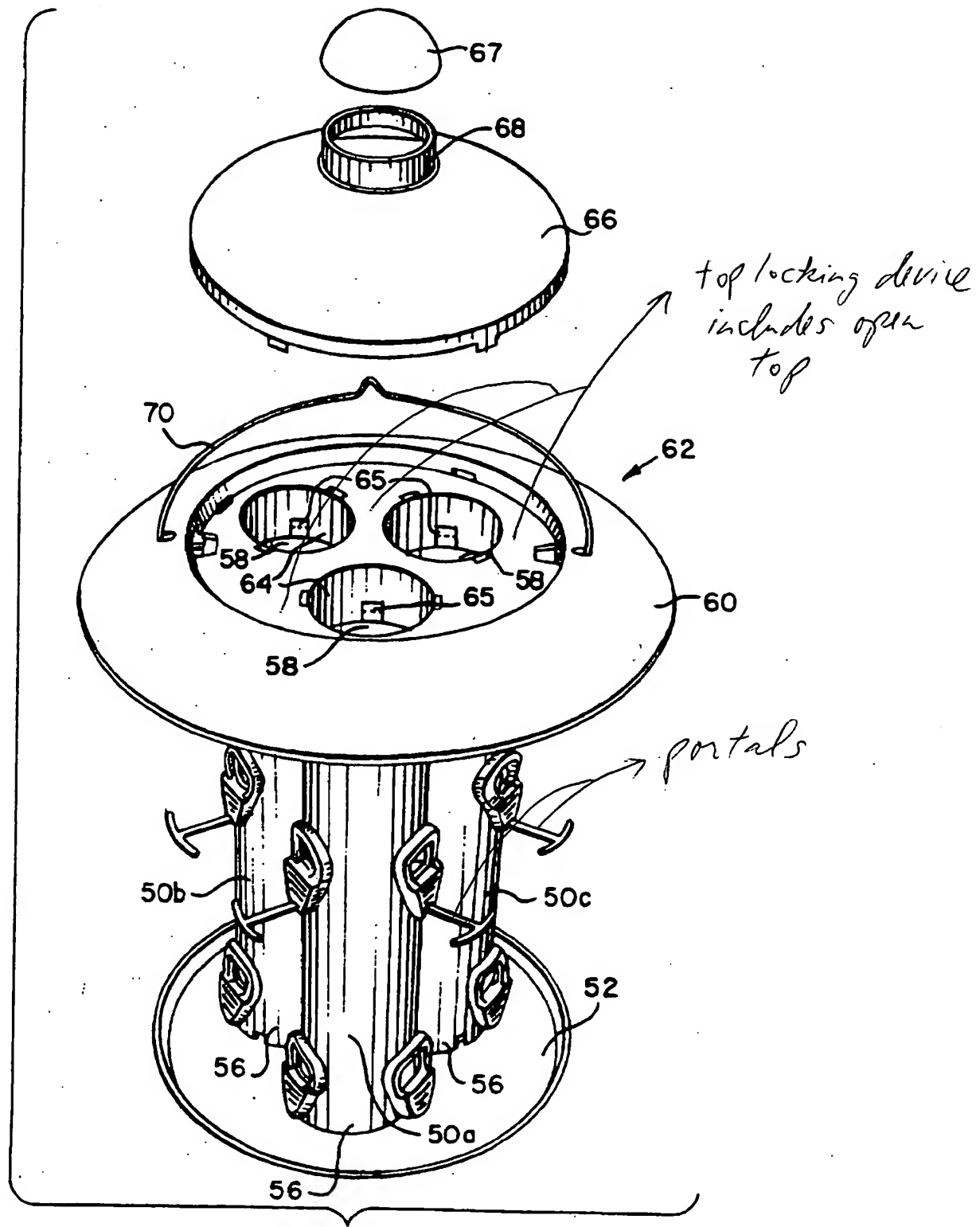


Fig. 5